LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
APR 1 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. ~~250~~ 46

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY ET AL., *Appellees*.

No. ~~250~~ 47

RAILROAD COMMISSION OF TEXAS, *Appellant*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY ET AL., *Appellees*.

Appeal from United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF ABOVE NAMED APPELLANTS OPPOSING MOTIONS TO AFFIRM

PRICE DANIEL,
Attorney General of Texas for Railroad Commission of Texas,
Austin, Texas.

WM. A. DISQUE,
Attorney for Galveston Chamber of Commerce and Houston Port and Traffic Bureau.
1001 Fifteenth St., N. W.,
Washington 5, D. C.

April 10, 1950.

TABLE OF CONTENTS

	Page
Opening Statement	1
Statutes and Provisions of Constitution Involved	2
The Decision of the Interstate Commerce Commission	3
The Decision of the District Court	5
Argument	6
Conclusion	14

CITATIONS

COURT CASES:

Baltimore & O. R. Co. v. United States, 298 U. S. 349	13
Illinois Commerce Com. v. United States, 292 U. S. 474	13
Interstate Commerce Com. v. Diffenbaugh, 222 U. S. 42	12
Louisiana Pub. Serv. Com. v. Texas & N. O. R. Co., 284 U. S. 125	12
New York v. United States, 331 U. S. 284	13
Northern Pac. Ry Co. v. North Dakota, 236 U. S. 585	7
Pennsylvania v. Wheeling and Belmont Bridge Co., 18 Howard 421	11

INTERSTATE COMMERCE COMMISSION CASES:

Petroleum and Petroleum Products, Calif. to Ariz., 241 I. C. C. 21	8
Rail and Barge Joint Rates, 270 I. C. C. 591; 274 I. C. C. 229	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No.

GALVESTON CHAMBER OF COMMERCE AND HOUSTON PORT AND TRAFFIC BUREAU, *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY ET AL., *Appellees.*

No.

RAILROAD COMMISSION OF TEXAS, *Appellant,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AMERICAN BARGE LINE COMPANY ET AL., *Appellees.*

Appeal from United States District Court for the Northern District of Illinois, Eastern Division.

BRIEF OF ABOVE NAMED APPELLANTS OPPOSING MOTIONS TO AFFIRM

OPENING STATEMENT.

The Texas interests above named who file this brief were intervening plaintiffs or complainants in a case before the United States District Court for the Northern District of

Illinois, Eastern Division, brought by various railroads, Civil Action No. 49 C 1434, *The Alabama Great Southern Railroad Company et al.* v. *United States of America et al.*, in which all the original and intervening plaintiffs have filed appeals.

The brief is a reply to motions to affirm filed by certain appellees, namely: Interstate Commerce Commission; American Barge Line Company; Inland Waterways Corporation, operating the Federal Barge Line; and Mississippi Valley Barge Line Company. The Texas interests have not been served with a motion by the appellee United States of America, and understand that no such motion has been filed.

A motion to affirm seems to be appropriate in a one-sided case, but if there is any one-sidedness in this case, the one-sidedness certainly does not lie on the appellees' side.

The appellees say that no new or substantial questions are presented by this case. We think it will be plain from the briefs filed in opposition to the motions that new and important questions are involved and that the District Court has gravely erred in its decision.

May it be understood at the outset that the Texas interests concur in and support what is said in the railroad appellants' brief opposing the motions to affirm. What is herein said is supplemental thereto and bears particularly upon the legal wrong suffered by the Texas interests as a result of the Commission's order and the District Court's failure to set aside and enjoin that order.

STATUTES AND PROVISIONS OF CONSTITUTION INVOLVED.

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C., and the Constitution are set out in the Appendix to this brief.

THE DECISION OF THE INTERSTATE COMMERCE COMMISSION.

The rates prescribed by the Interstate Commerce Commission in its Docket No. 26712,[1] which brought on this proceeding, are for rather general application to the through transportation of package or merchandise freight partly by rail and partly by barge principally in the territory between the Rocky and Appalachian Mountains. They are differentially lower than the all-rail rates between the same points. They include rates between New Orleans, La., and interior points west of the Mississippi River, with which this brief particularly deals; for example, rates on imported Brazilian coffee moving from New Orleans up the Mississippi River to Memphis, Tenn., and thence by rail inland to Wichita, Kans. The effective date of the order requiring the establishment of the rates prescribed in No. 26712 has been postponed because of this court proceeding.

The Texas interests who file this brief are vitally concerned with the barge-rail rates between New Orleans and the interior territory west of the Mississippi River because Galveston and Houston as ocean ports are in keen competition with New Orleans for export, import, coastwise and intercoastal traffic coming from and going to that interior territory. The record in the case before the Commission showed that the Galveston and Houston interests would suffer great detriment if the prescribed rates between New Orleans and the interior West should become effective while the all-rail rates between Galveston and Houston and that territory remain relatively higher. (Tr. 9466-9626; Exhibits 1032-1035) The questions presented by the case are vital to the welfare of Galveston and Hous-

[1] *Rail and Barge Joint Rates*, 270 I. C. C. 591; 274 I. C. C. 229.

ton. Moreover, they are of great public importance, as they affect the national transportation economy.

The rates prescribed by the Commission in No. 26712 were to generally replace a system of similar differential barge-rail rates that had grown up over a period of about 25 years principally in conformity with orders of the Commission in cases under the so-called Denison Act, which purported to give the Commission authority to prescribe such rates without a hearing, at a time when it was commonly believed and understood that barge-rail transportation, like barge transportation, could be performed at much lower cost than all-rail transportation. The case before the Commission arose out of demands by railroads for a hearing on this subject. The statutory authority relied upon for the prescription of the rates in that case is section 307(d) of the Interstsate Commerce Act, 49 U. S. C. 907(d), which provides that the Commission may after hearing prescribe such differentials for barge-rail rates as it may find to be "*justified*", which of course means justified by the evidence.

The record in No. 26712 contains a large amount of evidence regarding what it cost all-rail routes as compared with competing barge-rail routes to transport freight. This evidence, consisting of oral testimony and exhibits, was offered by witnesses on both sides. It was referred by the Commission to members of a commission employee staff of cost-finding experts, who analyzed it and at one of the hearings presented a summary thereof, adequately supported by detailed data, explanations and reasons. The general conclusion of the experts, quoted just below the middle of page 604 of the Commission's original report, is to the effect that barge-rail costs exceed all-rail costs, due largely to the relatively high cost of barge terminal operations and the cost of handling the freight between barges and railroads at the river-landing transfer points. And just below the

middle of page 606, the Commission makes the following statement:

> In the face of these facts we cannot find that at the present time there are demonstrable economies in barge-rail transportation on the Mississippi River and its tributaries, including the Warrier, which from the standpoint of cost of service would justify differentials.

Notwithstanding this definite, basic and unqualified finding of fact, the Commission prescribed and ordered a system of differentials which would be deducted from all-rail rates to replace most of the existing barge-rail rates.

THE DECISION OF THE DISTRICT COURT.

Before the District Court, the Texas interests joined the railroad plaintiffs in saying that the Commission prescribed differential barge-rail rates without finding demonstrable economies in barge-rail transportation and thus showed that it obviously looked upon the differential provision of section 307(d) of the Interstate Commerce Act as a mandate to prescribe differential rates regardless of costs and other transportation circumstanes and conditions. The appellees point out in their motions that the District Court interpreted the Commission's above-quoted statement regarding relative costs practically as a finding that there were no usable cost data in the record. The District Court and the appellees give to the above quoted statement a meaning wholly unjustified. They would dismiss costs from consideration and base the differentials primarily, if not altogether, on the fact that barge-rail service is inferior to all-rail service.

The strained and peculiar meaning which the District Court and the appellees attribute to the Commission's conclusion regarding relative costs, and the emphasis placed thereon by the appellees in their motion to affirm, bring

into bold relief the following paragraphs on page 606 of the Commission's original report:

> In his testimony before the subcommittee mentioned above, Federal's president stated that "many large operators, private, contract, and common carriers have better, more efficient fleets and provide faster and more dependable service than the Federal barge lines." He pointed out, however, that the private lines have also encountered the problem of rising terminal costs and *do not want* most types of merchandise freight because of the high cost of handling it under present terminal methods.
>
> This development is illustrated by the experience of Valley,[2] whose increasing proportion of bulk freight since 1941 has previously been mentioned. In that year it interchanged more than 325,000 tons of freight with railroads, but in 1947 its joint traffic was only 37,000 tons. This decline of 89 percent apparently was due in large part to embargoes placed against rail-barge traffic by Valley *in order to avoid a serious loss of revenue* owing to the expense of transferring freight between barges and railroad cars. Although it still has some hope of profitable participation in this joint traffic at a future time, the outlook is obscure. (Emphasis supplied)

The appellees' repeated assertions that the cost data are stale and the inference left that they are entitled to differential barge-rail rates is completely negatived by these paragraphs.

ARGUMENT.

National Transportation Policy declared in the opening paragraph of the Interstate Commerce Act contemplates an appraisal of the inherent advantages of all-rail and barge-rail services, respectively, and the cost of performing the respective services is in the nature of things the basic and most important feature to be considered. The

[2] Means Mississippi Valley Barge Line Company.

value of the respective services may also be considered, but not to the exclusion of the basic and major element of relative cost. Any dismissal of costs as a major element means a violation of the fundamental purpose of the national transportation policy.

Although the Commission and the barge lines, when before the District Court, in terms condemned the cost data as stale and otherwise undependable, the efficiently operated private barge lines in real life by their acts and deeds recognize that the cost data correctly portray the actual situation. They know the traffic is unprofitable and for that reason they embargo it. It is not embargoed because of congestion or physical disabilities. According to the above quoted paragraphs, the rates prescribed by the Commission are below the cost of the service. The rates on the traffic here involved are therefore an unlawful burden on other traffic. *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585. The District Court did not overlook the facts in the two above quoted paragraphs, but fell into fatal error in not giving effect to what they plainly proved. Incidentally, it may be noted that the lawfulness of the embargoes is before the Commission in Dockets No. 30118, *New Orleans Traffic and Transportation Bureau* v. *Mississippi Valley Barge Line Company,* and No. 30123, *New Orleans Traffic and Transportation Bureau* v. *American Barge Line Company.* The embargoes naturally suggest a question, viz: Why does not the Federal Barge Line embargo this traffic like the two other lines? The Federal Barge Line is subsidized. It operates at a loss, and generally has done so since it was organized over 30 years ago. The public pays the bill. Many months ago the Federal Barge Line asked Congress for 18 million dollars of public funds for new equipment. If an appropriation is ever made the barge line may hope to do business at lower cost, but judging by its past there is every reason to believe that it could not do even as well as the efficiently operated private barge lines, which find the traffic unprofitable. In the

light of these disclosures, the fact that the barge-rail service is inferior does not save the situation for appellees. It is clear that the Commission should have found, if it did not, that there are no economies in barge-rail service. No one can fairly say that inferior service justifies differential barge-rail rates when the traffic does not pay expenses. Thus the Commission was absolutely arbitrary in requiring differential barge-rail rates. This is not a case in which one form of transportation is voluntarily making rates to meet a competing parallel form by the maintenance of compensatory rates, but one in which the power of the Government is sought to be used unlawfully to compel one form of transportation which has a natural cost-of-service advantage to give up traffic and revenue to a high-cost competing form. Plainly the barge-rail rates are violative of the declared national transportation policy.

In *Petroleum and Petroleum Products, Calif., to Ariz.*, 241 I. C. C. 21, the Commission was investigating the rates of two competing forms of parallel transportation, viz.: railroads and motor carriers. At page 41 of its report, it referred to the National Transportation Policy as then expressed in the Interstate Commerce Act and the Motor Carrier Act, which, particularly so far as the present case is concerned, was not materially different in principle from that now stated in the opening paragraph of the Interstate Commerce Act with respect to all regulated forms of transportation. The Commission then went on and said:

> The corresponding rule of rate making for motor-carrier rates is contained in section 216 (i) of the Motor-carrier act. The two rules are practically identical except that the motor-carrier rule contains the added direction that consideration shall be given "to the inherent advantages of transportation by such carriers." This additional provision was included to make certain that the motor carriers would be regulated with a view to the conditions inherent in the motor-transportation industry

without regard to the interest of any other mode of transportation. In fairness, we should give consideration to the inherent advantages of transportation by rail when rates by rail carriers are before us, particularly in a proceeding where competing rates of motor carriers are also under review. The two rules for rate making, together with section 202 (a), indicate the policy of Congress to be that in the regulation of these transportation agencies we should recognize and preserve in the interest of the public the inherent advantages of each. The inherent transportation advantage possessed by the rail carriers in transporting petroleum and petroleum products from California to Arizona is the relatively low cost of rail service. The element of cost is not the only factor to be considered in determining the reasonableness of the rate to be charged, but it may become the dominant factor where two different modes of transportation are competing for the same traffic. In such a case the other factors which influence the fixing of rates such as volume of movement, value of service to the shipper, and the value of the commodity carried are of less importance.

Particular attention is called to the last three complete sentences. It is respectfully urged that in considering the rates of competing forms of transportation, cost is a dominant element and should not be wholly disregarded as the appellees seem to contend it may be. It was the duty of the Commission to consider relative costs in this case. Cost is too important an element to be cast aside. If the Commission felt that the cost data was for any reason unusable, it was its duty to further investigate and get satisfactory data, because under the differential provision of section 307 (d) it has the burden of finding justification before it prescribes differentials. It is here interesting to note that about ten years ago, after the Commission got rather complete jurisdiction over motor and water transportation, as it already had over rail transportation, it set up and developed in its organization

a well-equipped cost-finding staff. In other words, the Commission was fully conscious of the fact that, in order to properly regulate competing forms of transportation, data as relative costs were necessary. It was members of its cost-finding staff who testified, as above stated, in No. 26712 before the Commission that barge-rail costs exceed all-rail costs.

Under Reorganization Plan No. II, 53 Stat. 1434, the Secretary of Commerce has operated the Federal Barge Line since July 1, 1939. His printed report to the President of the United States, dated December 1, 1949, entitled "Issues Involved in a Unified and Coordinated Federal Program For Transportation," contains the following language beginning new the bottom of page 45:

> "* * * the Government should consider continuing its various promotional programs along lines which call for payment by the user for the various facilities. Government regulatory agencies should simultaneously consider the elimination of rates which are not closely related to the fully distributed cost of rendering the service. If action along both lines were to proceed at the same time, most of the legitimate complaints which the railroads have against their competing carriers would be eliminated and most of the legitimate complaints which water and motor carriers have against the rail carriers would be disposed of. The net result would be a more effective use of transport resources with each type of carrier performing the various services in which it had a cost advantage. This, after all, is the basic objective of the Transportation Act of 1940, and action of the sort just described appears necessary in order that the objective of the 1940 act may be realized."

We cannot reconcile these sound statements of the governing head of the Federal Barge Line with the position taken by that line's officials in this case.

A relatively few shippers, such as those at New Orleans, get part of their freight charges on shipments via the Fed-

eral Barge Line and rail connections paid out of the United States Treasury. Shippers at Galveston and Houston ship by rail to and from the interior West and pay their own freight charges in full. By the Commissioner's decision, unduly favorable treatment and artificial advantages are arbitrarily accorded New Orleans interests to the detriment of the Texas interests. This is obviously a violation of Section 3 (1) of the Interstate Commerce Act by the very tribunal that is charged with preventing undue preferences and prejudices.

The Texas interests urged before the District Court that the prescribed barge-rail rates preferred the State of Louisiana over the State of Texas, in violation of Article 1, Section 9, Clause 6, of the Constitution, which was enacted for the purpose of protecting the individual States from discrimination by Congress. In *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 Howard 421, the Supreme Court said that the above-mentioned provision of the Constitution might embrace any description of legislation looking to a direct privilege or preference of the ports of one State over those of another. The contention of the Texas interests was that if the Commission was correct in construing the differential provision of section 307 (d) of the Interstate Commerce Act as a mandate to give New Orleans and other ports served by inland waterways differential barge-rail rates regardless of cost and other transportation circumstances and conditions, it was arbitrary and unconstitutional because it meant that States having such ports would be given an artificial advantage over States not having such ports. It was further contended by the Texas interests that the only way to regard the differential provision as constitutional was to hold that it is not a mandate and that differentials must be "*justified*" by proved transportation conditions.

In the second paragraph on page 16 of the barge lines' motion to affirm is a statement that as to the alleged viola-

tion of the ports preference clause of the constitution, the District Court's holding is fully supported by *Louisiana Pub. Serv. Com.* v. *Texas & N. O. R. Co.*, 284 U. S. 125, 131. About all that can be said for that decision is that it *related* to a ports preference allegation. It contains nothing that is even helpful in considering the constitutional question presented in the instant case.

In the first paragraph on page 15 of the barge lines' motion is seen a highly erroneous statement that the Texas interests are dissatisfied with the Commission's order because it provides for New Orleans the advantages of its location on the Mississippi River. As clearly indicated upon brief and oral argument before the Court, the fact is that the Texas interests complained that the advantages enjoyed by New Orleans are due to the arbitrary action of the Commission in prescribing differential barge-rail rates from and to that point without facts of record to justify them. The interior territory west of the Mississippi River, from a geographical standpoint, is naturally tributary to Galveston and Houston. New Orleans, as compared with Galveston and Houston, is unfortunately situated with respect to that territory, but the Commission's order undertook to afford New Orleans artificial competitive advantages, notwithstanding the well-known doctrine of *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, 46, and other cases that the law does not undertake to equalize or remove natural disadvantages of geographical location.

In the second paragraph on page 15 of the barge lines' motion is a statement that the Texas interests seek to have the Supreme Court substitute its judgment for that of the Commission. This statement is uncalled for. Everyone familiar with administrative law knows that the Commission's decisions are final and that they can be set aside only on a certain few grounds laid down by the Supreme Court.

Near the top of page 6 of the barge lines' motion reference is made to what the District Court had to say against

the evidence before the Commission as to average railroad system costs. In this connection it should be observed that according to *New York* v. *United States*, 331 U. S. 284; 328; 335,[3] the quality and effect of cost evidence is a question of fact for a transportation cost expert and that the Commission is expert in matters of transportation. In the case cited, the Supreme Court sanctioned average system costs as a basis for judging class rates.

The District Court was arbitrary in permitting the Commission's order to stand in the face of the fact that the Texas interests showed that the Commission required the prescribed differentials to be deducted from existing all-rail rates without any finding that the all-rail rates were reasonable as bases for such deductions. How could the Commission know whether the prescribed barge-rail rates would be reasonable or even compensatory without first knowing that the all-rail rates between the same points were reasonable and compensatory?

The District Court was arbitrary in permitting the Commission's order to stand in the face of the fact that the Texas interests showed that by the proviso[4] at the end of finding 2 in the Commission's report the Commission undertook to determine barge-rail rates by a test which takes into account only the rail portion of the through haul, and that portion only where it exceeds a certain measure. The conditions and circumstances pertaining to the through haul should be the determining consideration.

---

[3] See also Illinois Commerce Commission v. United States, 292 U. S. 474, 481; and Baltimore & O. R. Co. v. United States, 298 U. S. 349, 359.

[4] It reads: * * * provided, however, that this finding * * * shall not require the establishment of barge-and-rail commodity rates between New Orleans and an interior point which shall be lower than the rate on the same commodity between Houston or Galveston and the same interior point where the short-line rail distance between such point and Houston or Galveston is not greater than the short-line rail distance between the same point and the port of interchange in the barge-and-rail route to or from New Orleans.

CONCLUSION.

The appellees' motions to affirm should be denied. The District Court should be reversed forthwith and the case remanded to it with instructions to issue the permanent injunction sought against the Commission's order.

Respectfully,

PRICE DANIEL,
Attorney General of Texas for Railroad Commission of Texas,
Austin, Texas.

WM. A. DISQUE,
Attorney for Galveston Chamber of Commerce and Houston Port and Traffic Bureau.
1001 Fifteenth St., N. W.,
Washington 5, D. C.

April 10, 1950.

APPENDIX.

Relevant Provisions of the Constitution and Statutes.

THE CONSTITUTION, Article I, Section 9, Clause 6:
No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another; nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

THE INTERSTATE COMMERCE ACT:

NATIONAL TRANSPORTATION POLICY [Added September 18, 1940.] [U. S. Code, title 49, notes preceedings secs. 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SEC. 1. 49 U. S. C. (1) (a)

(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment;

SECTION 1 (5) (a) 49 U. S. C. 1 (5) (a). All charges made for any service rendered or to be rendered in the transpor-

tation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

SEC. 3. (1) 49 U. S. C. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Sec. 307. (d) 49 U. S. C. 907(d) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. * * *

CERTIFICATE OF SERVICE.

I certify that a copy of the foregoing brief was served on counsel for all parties of record by mail on this tenth day of April, 1950.

WM. A. DISQUE